In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 840

IB OTTO ASTRUP, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 432 F. 2d 438. The memorandum decision of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1970. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including October 16, 1970. The petition was filed on October 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 315(a) of the Immigration and Nationality Act, 8 U.S.C. 1426(a), provides:

> Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

QUESTION PRESENTED

Whether a resident alien who applied for and received an exemption from military service as an alien, knowing that this rendered him permanently ineligible for United States citizenship, remains ineligible to become a citizen of the United States, even though the exemption was withdrawn by the United States and the alien presented himself for induction but was rejected as physically unfit.

STATEMENT

Petitioner, a native and citizen of Denmark, filed a petition for naturalization in the United States District Court for the Northern District of California. The Immigration and Naturalization Service opposed the petition on the ground that petitioner was ineligible for citizenship, having applied for and received exemption from military service within the meaning of Section 315(a) of the Immigration and Nationality

Act, 8 U.S.C. 1426(a). On November 14, 1968, the district court denied the petition for naturalization (Pet. App. B). The court of appeals affirmed the judgment on the basis of its prior decision in *Lapenieks* v. *Immigration and Naturalization Service,* 389 F. 2d 343 (C.A. 9), certiorari denied, 391 U.S. 951.

The facts are undisputed. Petitioner entered the United States for permanent residence on February 20, 1950. On August 20, 1950, he registered with the Selective Service System. He was thereafter classified I–A (available for military service) and ordered to report for induction. On November 14, 1950, he executed an "Application by Alien for Relief from Training and Service in the Armed Forces" (SSS Form 130), requesting exemption from military service on the ground of alienage. At the time he signed the application for exemption from military service, he knew that he would thereby become permanently ineligible for United States citizenship. On November 15, 1950, pursuant to Section 4(a) of the Selective Service Act of 1948, 50 U.S.C. (1950 Supp.) App. 454(a), his draft board classified him IV–C (alien not currently liable for military service).

In 1951, Congress amended the Selective Service Act of 1948 to eliminate from Section 4(a) the provision under which permanent resident aliens could elect to obtain exemption from military service on the ground of alienage. Pursuant to the amended statute, petitioner's draft board reclassified him I–A on August 6, 1952, and he was ordered to report for induction. On September 2, 1952, he was examined and found not physically qualified for military service.

On November 24, 1952, he was reclassified V-A (over age of liability for military service).

DISCUSSION

Petitioner contends that he was not "relieved" from military service, within the meaning of the citizenship disqualification set forth in Section 315(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1426(a)), because his alien exemption was subsequently withdrawn by amendment of the Selective Service Act the next year. He argues that he was thereafter subject to military service, and thus was "relieved" only because he failed to pass the physical examination. The petition argues that the statute should accordingly not be construed to disqualify petitioner and that, if it is so construed, it is unconstitutional.

The issue raised by the petition is identical with that raised in *Lapenieks* v. *Immigration and Naturalization Service,* 389 F. 2d 343 (C.A. 9), in which certiorari was denied in the 1967 Term (No. 1305, 391 U.S. 951). Nonetheless, upon reflection we now believe that the statutory construction for which he contends may have some basis. Although petitioner was for a time relieved from military service under his application for an alien exemption in which he knowlingly relinquished any claim to citizenship, it is true that he unexpectedly lost the continuing benefit for which he made that relinquishment and it was only the supervening factor of unfitness that finally kept him from service. The election made in 1950 was

undoubtedly induced by the statute then in force. [redacted]. When the government terminated its part of that arrangement by actually calling petitioner for service after the repeal of the statute in 1951—as it undoubtedly had power to do—it may be that the petitioner's election fell. It is not clear that Congress intended Section 315(a) to apply with all its rigor in these circumstances.

1. There are, however, arguments to the contrary. Petitioner might not have been found unfit for service in 1950, when he asserted his alien exemption; if, as is possible, the disqualifying physical condition detected in 1952 developed between 1950 and 1952, the short-lived alien exemption did in fact afford him in practical effect a permanent exemption from the draft. And application of Section 315 here could well be justified on the simple principle that petitioner should be held to the knowing choice he made in 1950. See *Ceballos* v. *Shaughnessy*, 352 U.S. 599 (upholding the disqualification established in different terms under the Selective Service Act of 1940); cf. *Brady* v. *United States*, 397 U.S. 742, 757.[1]

2. Although petitioner asserts a conflict in circuits (Pet. 9–10), in fact the decision below is in accord with that of every court of appeals which has passed upon the question here presented. *In re Naturalization of Cuozzo*, 235 F. 2d 184 (C.A. 3); *United States* v.

[1] *Moser* v. *United States*, 341 U.S. 41, relied on by petitioner, is distinguishable. The courts there made the express finding that Moser signed the application for exemption believing he was not precluded from citizenship, and that had he known of this consequence, he would have elected to serve in the armed forces. *Id.* at 45.

Kenny, 247 F. 2d 139 (C.A. 2); *In re Skender's Petition*, 248 F. 2d 92 (C.A. 2), certiorari denied, 355 U.S. 931. The decisions relied upon by petitioner (*United States* v. *Hoellger*, 273 F. 2d 760 (C.A. 2), *United States* v. *Lacher*, 299 F. 2d 919 (C.A. 9), and *United States* v. *Bazan*, 228 F. 2d 455 (C.A. D.C.)), are based on different facts. Except for *Bazan*, the aliens in these cases actually served in the armed forces after the withdrawal of their exemptions; under such circumstances a court could reasonably find that they had not been effectively relieved from military service by their claims of exemption.[2] In *Bazan*, the alien attempted on his own to withdraw an application for an exemption about a year after it was filed. The court upheld a grant of citizenship on the ground that, although the record showed that he had made the application, *no* evidence was before the court to establish that he was relieved from service for that reason. No such deficiency exists in the instant record. In 1950, petitioner was actually classified I–A and ordered to report for induction, and his

[2] Indeed in *Hoellger*, *supra*, the court expressly stated in dictum: "An alien who postpones induction by means of application for exemption, and who is thereafter rejected for physical disability, may legitimately be said to have been relieved from military service by virtue of his exemption application." 273 F. 2d at 763 n. 2.

application for exemption as an alien terminated that order.[8]

3. Petitioner's constitutional arguments are, we believe, without merit. The statute, if construed against him, simply disqualifies from citizenship all aliens who have knowingly utilized their alienage to obtain relief from military service. An exception has been recognized for those who have actually served in the armed forces after the withdrawal of the exemption, but there is no constitutional principle of equal protection that requires a similar exception to be established for an alien who has received some benefit from the former exemption and has not in fact served in the military.

Nor would such statutory ineligibility for citizenship amount to any form of "punishment", "cruel and unusual" or otherwise. Naturalization is a privilege that the sovereign may reasonably confer, withhold or qualify, and an alien may claim it as of right only upon compliance with the terms which Congress imposes. *United States* v. *MacIntosh*, 283 U.S. 605,

[8] The district court cases cited by petitioner are also distinguishable. *In re Wendt*, 300 F. Supp. 725 (N.D. Ill.), held that where the alien was overage at the time he claimed exemption and a member of the draft board testified that he would not have been called because of his age even if classified I-A, he was *effectively* relieved of service by board policy rather than by his signing the alien exemption form. *Id.* at 727. In *In re Kadich*, 221 F. Supp. 353 (S.D.N.Y.), the alien exemption was granted by mistake and withdrawn by the Government as soon as it was discovered; the court held that under these circumstances, his exemption, effective for a period of time, did not bar citizenship even though he was subsequently ordered to report for induction and rejected as psychoneurotic.

615, and *United States* v. *Schwimmer*, 279 U.S. 644, both cases overruled on other grounds, *Girouard* v. *United States*, 328 U.S. 61. The burden is on the alien to bring himself within the statute and doubts are to be resolved in favor of the United States and against the claimant. See *Berenyi* v. *District Director*, 385 U.S. 630.

The fact that decisions made in the course of the military induction process concerning eligibility for service in the armed forces may affect eligibility for citizenship does not make the military an arbiter of citizenship. *Trop* v. *Dulles*, 356 U.S. 86, cited by petitioner, dealt with statutory *removal* of citizenship for desertion. Here the fact of service merely removes the bar created by the alien's deliberate decision to waive citizenship in order to avoid service.

CONCLUSION

We do not formally oppose the petition for a writ of certiorari in this case, but we have deemed it appropriate to point out some of the factors pertinent to the Court's disposition of the petition.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970